HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

W.P. No. 1236 of 2003 (SS)

Dr. Chandra Shekhar Pathak & others vs. State of Uttaranchal

Approved for reporting.

_____

~~Not approved for reporting~~

Date of decision. 23.10.2003

Initial of Judge

HIGH COURT OF UTTARANCHAL AT NAINITAL.

Writ Petition no. 1236 of 2003(SS)

Dr. Chandra Shekhar Pathak & 32 others ……. Petitioners

Versus

State of Uttaranchal & others ……. Respondents

Sri K. N. Joshi, Advocate for the petitioners
Standing Counsel for the respondents.

Dated:-23.10.2003

Hon'ble Rajesh Tandon, J.

The petitioners have filed the present writ petition praying for a writ order or direction in the nature of mandamus directing the respondents to give seniority to the petitioners from their initial date of appointment.

Brief facts giving rise to the present writ petition are that petitioners were appointed in the Education Department in different pay scale in different schools and colleges against the posts under the preview of Public Service Commission. The petitioners are working in the Department from the date of their appointments. The details of the

appointment and regularization has been submitted by the petitioners in their supplementary affidavit. The list is given as under:

S.N.	Name of teacher	Initial date of appointment	Date and order no. of regularization
1.	Dr. Chandra Shekhar Pathka	15.12.1979	Lect/209/23-3(48)/2/ 86-87 dated 16.2.87
2.	Umesh Chandra Pandey	24.4.1970	L.T/477-977(143)80-81 dated 4.8.81
3.	Jiwan Chandra Kothari	9.11.1971	LT 14295-405/23-4/143/80-81
4.	Trilok Singh Mehta	15.11.71	LT8/23-3(143)86-87 dated 5.6.86
5.	Madhwanand Lohni	21-11-72	LT 477-977-23-4 (143) 80-81 dated 8.4.81
6.	Smt. Hema Pandey	29.8.72	2/433/23-29/47/8/81 82 dated 5.9.81
7.	Narayan Singh Bisht	9.12.74	LT 9932/23-4(143) 81-82 dated 20.8.81
8.	Dev Singh Karki	28.9.76	LT/8/23(143) 86-87 dated 5.6.86
9.	Triloki Chandra Pandey	2.2.76	LT 8-23-4 (143) 86-87 dated 5.6.86
10.	Kailash Chandra Pandey	4.1.76	LT/8/23-4 (143) 86-87 dated 5.6.86
11.	Purna Chandra Pant	28.4.76	LT/8/23-4 (143) 86-87 dated 5.6.86
12.	Ravindra Singh Mehta	19.8.76	LT/8/23-4 (143) 86-87 dated 5.6.86
13.	Basant Ballabh Joshi	23.8.76	LT/8/23-4 (143) 86-87 dated 5.6.86
14.	Rajeev Kumar Pandey	14.11.77	Lect/209/23-3 (48) 86 87 dated 5.5.86
15.	Narayan Dutt Bhatt	31.10.79	LT/96/5-2 (3) 90-91 dated 1.12.90
16.	Pratap Singh Mehta	26.12.79	G.O./1996, 5-2 (3), 90 91 dated 1.12.90
17.	Madan Mohan Pandey	14.3.80	Lect/209/23-3(48)/2/ 86-87 dated 1.12.90
18.	Chandra Shekhar Bhatt	7.3.81	1174/5-2(3) 85-86 dated 7.3.86
19.	Girish Chandra Pant	14.11.79	G.O./1996/5-2(3)/90-91 dated 1.12.90
20.	Umesh Chandra Pant	24.8.81	G.O./1996-2)3/90-91 dated 1.12.90
21	Devendra Kumar Joshi	19.7.90	Lect/3331-3581/1999-27.12.99

22.	Prayag Singh Rawat	24.7.90	Lect/3331-3581/99-2000 dated 27.12.99
23.	Smt. Chandrakala Karki	16.8.90	G.O./99-2000 dated 28.12.99
24.	Km. Asha Joshi	20.8.90	G.O.(2)/224/23-2/99 2000 dated 27.12.99
25.	Shatrughan Lal	25.8.90	Lect/3331-3581/1999 2000 dated 27.12.99
26.	Smt. Kamla Tamta	16.8.90	G.O./666/99-2000 dated 28.12.99
27.	Diwan Singh Bisht	12.10.90	G.O. 783/99-2000 dated 31.12.99
28.	Govind Singh Bora	27.11.99	G.O. 758-2001-2002 dated 5.3.2002
29.	Rajeev Kumar Diwedi	26.12.90	G.O. 758/2001-2002 dated 5.3.2002
30	Smt. Meena Mehta	10.1.91	G.O./758/2001-2002 dated 5.3.2002
31.	Nathu Ram Joshi	3.4.91	G.O./758/2001-2002 dated 5.3.2002
32.	Prem Singh Dhami	9.12.91	G.O./Lect, 3843-3997 2002-2003 Dated 9.9.2002
33.	Smt. Parvati Devi	17.2.92	Lect/45/2002-2003 dated 9.5.2002

By the notification No. 19/8/75-Karmik 1-1 dated 14th May 1979 called as U.P. Regularisation of Ad hoc appointment (Out side the preview of Public Service Commission). By the said notification employees who were appointed before 1st January 1979 and have completed more than three years of service were directed to be regularized by Departmental selection Committee. The aforesaid notification dated 14th May 1979 was further extended to the employees who were appointed up to 1st May 1983 and as such they have become entitled for regularisation. On 7.8.1989 cut of date was further extended and the employees who were appointed on or before 1.10.1986 they have also made entitled to be regularised.

Rule 4 of U.P. Regulation of Ad Hoc Appointments (on posts within the purview of the Public Service Commission) Rules 1979:

तदर्थ नियुक्तियों का विनियमितीकरण दृ 1. किसी व्यक्ति की.

एक. जो सेवामे 1.1.1977 के पूर्व तदर्थ आधार पर सीधे नियुक्त किया गया हो और इस नियमावली के प्रारम्भ के दिनांक को उस रूप में निरन्तर सेवारत हो,

दो. जो ऐसी तदर्थ नियुक्ति के समय नियमित नियुक्ति के लिये विहित अपेक्षित अर्हताऐं रखता हो और

तीन जिसने तीन वर्ष की निरन्तर सेवा पूरी कर ली हो या यथास्थिति पूरी करने के पश्चात किसी स्थायी या अस्थायी रिक्ति में जो उपलब्ध हो, नियमित नियुक्ति के लिए ऐसी रिक्ति में संगत सेवा नियमों या आदेश के अनुसार कोई नियमित नियुक्ति करने से पूर्व उसके अभिलेख और उपयुक्तता के आधार पर विचार किया जायेगा ।

3. ....

4. नियुक्ति प्रधिकारी अभ्यार्थियों की एक पात्रता सूची उस ज्येष्ठता क्रम में तैयार करेगा जैसा कि नियुक्ति के आदेश के दिनांक के अनुसार आधारित हो और यचदि हो या अधिक व्यक्ति एक साथ नियुक्ति किये जाये तो उस क्रम में तैयार करेगा जिस क्रम में उनके नाम उक्त नियुक्ति के आदेश में क्रमबद्ध किये गये हों । सूची को अभ्याथियों की चरित्र पंजियों और उनके सम्बन्ध में ऐसे अन्य अभिलेखों सहित जो उनकी उपयुक्तता को निर्धारित करने के लिए आवश्यक हो चयन समिति के समक्ष रखा जायेगा ।

5. चयन समिति अभ्यार्थियों के मामलों पर उपनियम 4 में निर्दिष्ट उनके अभिलेखों के आधार पर विचार करेगी ।

6. चयन समिति चुने गये अभ्यार्थियों की एक सूची तैयार करेगी । सूची में नाम ज्येष्ठता क्रम में रखें जायेंगें और वह उसे नियुक्ति प्राधिकारी को भेजेगी ।

Rule 9 of the aforesaid Rules has been extended and a new Rule 10 has been added as under:

10.– नियमावली का विस्तार– इस नियमावली के उपबन्ध यथावश्यक परिवर्तन ध्सहित किसी एसे व्यक्ति पर भी लागू होंगें जो दिनांक 1 अक्तूवर 1986 करे या इसके पूर्व तदर्थ आधार पर सीधे नियुक्त किया गया हो और उत्तर प्रदेष लोक सेवा आयोग के क्षेत्रान्तर्गत पदों पर तदर्थ नियुक्तियों का विनियमितीकरण द्वितीय संसोधन नियमावली 1989 के प्रारम्भ के दिनांक की इस प्राकर की सेवा में बना रहा हो ।

The petitioners have stated that they were regularised in service as per G.O. dated 7.8.1989 which was extended from time to time to those persons also who were appointed on ad hoc basis on or before 1.10.1989. Thereafter even the process of regularisation continued by extending the cut off dated.

The petitioners have stated that in the seniority list published by the Education Department 10th February 2003 Annexure 4 to the names of the writ petition the candidates who were appointed between 1971 to 1980 have not been included in the list.

The petitioners have represented to the authorities on 25.12.2002, 7.8.2003, 7.7.2003 and 16.7.2003. The sole contention of the petitioners in their representation are that seniority has to be counted from the date of their initial appointments.

In view of the judgment of Apex Court in the case of Santosh Kumar vs. State of Andhra Pradesh and others 2003 AIR SCW 2970. It has been held by the Apex Court are as under:

A Constitution of Bench of this Court in Direct recruit Class II Engineering Officers' Association's case (supra) after considering various aspects and earlier decisions, summed up the conclusions in paragraph 47 of the judgment. For out purpose paras (A) and (B) of the said paragraph are relevant, which are extracted hereunder:-

47. To sum up, w hold that:

(A) Once and incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the Rules but the appointee continues in the post uninterruptedly till the regularisationof his serv ice in accordance with the rules, the period of officiating service will be counted.

The respondent and others were appointed as Sub-Inspectors out of seniority looking to the outstanding merit and record prior to the direct recruits like the appellant. Their services were admittedly regularised by relaxing the service Rules in exercise of power available under R. 47 of the General Rules. The appellant did not challenge the validity of R. 47 and no mala fides were established against the authorities in exercise of powers of relaxation under the said Rules. The Tribunal has recorded a finding that the rule relating to the methord of recruitment was not relaxed but only the conditions which had to be fulfilled for the purpose of promotion to the category of Sub Inspector were relaxed; this finding is not disturbed by the High Court; there was no relaxation as to the basic qualification; the State Government regularised the services of the respondent and others with retrospective effect from the date they were temporarily appointed as Sub Inspectors (OSSIs). It is also not disputed that they continued in service uninterruptedly for about 12-13 years till their services were regularised with retrospective effect. This being the factual position it could not be said that the corollary to paragraph 47 (A) of the aforementioned Constitution Bench judgment applies to the facts of the present case. Once their

services were regularised it cannot be contended that their initial appointment was only ad hoc basis and not according to the Rules and made as a stopgap arrangement. On the other hand paragraph 47 (B) supports the case of the respondents."

In the case of Brahma Shanker Tripathi vs. State of U.P. (2202) 2 UPLBEC 1943 the Division Bench of Allahabad High Court has held as under:

In our opinion the submission of learned counsel for the petitioner is correct. The facts of the case are convered by the Supreme Court decision in Union of India vs. Lalita Rao, 2001 (5) SCC 384. The question is whether the adhoc service is to be added to the total length of service. Since there is no provision in the relevant rules for determining the seniority of the employees in service, the principle laid down by the Supreme Court in Direct Recruitment Class II Engineering Officer Association vs. State of Maharashtra 1990 (2) SCC 715, have to be followed. In that decision the Supreme Court has held that where a person is appointed according to the Rules his seniority is to be computed the date of appointment and not from the date of confirmation. In the present case the petitioner was appointed in adhoc capacity in accordance with Rule 5 of the U.P. Subordinated Agriculture Service Rules, 1977 after selection against posts which were advertised. Hence, in our opinion the petitioner's service from

16.2.73 to 4.5.81 has to be added to the petitioner's total length of service for the purpose of seniority and his position in seniority will be fixed accordingly.

Further five Judges Constitution Bench of the Apex Court in the case Chandra Prakash and others vs. State of U.P. and another, 2002 (2) UPLBEC 12671 has held as under:

"We will not proceed to consider whether there is in fact any conflict between the two sets of judgments. In this process, we must bear in mind the fact that the judgment of this Court in Dr. Mathur's case was a confirming judgment wherein this Court upheld the findings of the High Court by a reasoned order though brief. Therefore, it becomes necessary to notice the basis of the judgment of the High Court which was under appeal before this Court in Dr. Mathur's case. In the said batch of writ petitions filed before the High Court including that of Dr. Mathur, the High Court held that appointments of temporary doctors were made against substantive vacancies which had fallen vacant due to non-availability of doctors. It also held that the eligibility of the writ petitioners therein for being appointed as PMS-II was not in dispute. It further held that the petitioners therein held the necessary qualification for regular appointment. From the record available before it , the High Court came to the conclusion that the petitioners therein had been working

against substantive vacancies and were never treated as ad hoc appointees. It also held that the mere fact that their services were not regularise would not deny those petitioners the benefit of their continuity in service from the date of their initial appointment, and a subsequent regularisation would not take away their right to seniority from the date of their initial appointment. It is on the basis of these findings that the High Court directed to fix the seniority of the temporary doctors from the date of their initial appointment in the PMS cadre, giving them all the service benefits which were due to them after fixing their seniority. It was this judgment when brought before this Court, a-3- Judges Bench upheld the same. It also noticed the fact the the Regularisation Rules did not given them that benefit. Still this Court held that those doctors were entitled to count their service from the date of initial appointment for the purpose of counting their seniority. We have already noticed that this judgment has been successively followed in the subsequent cases, on of which at least came before this Court and the said view of this Court was affirmed.

Applying the principles laid down in the above said cases, we hold that the judgment of the 2 Judges Bench of this Court dated 23.3.1995 as modified by the subsequent order dated 26.7.1996 by the same Bench, does not lay down the correct law, being in conflict with

the Larger Bench judgment. If that be so, the above writ petitions, from which this reference has arisen, will have to be decided de hors the law laid down by those two judgments of the Bench of two learned Judges. Therefore, having decided the issue that has arisen for our consideration we think it just that these writ petitions should now be placed before a Bench of three learned Judges for final disposal."

In the case of Dr. Chandra Prakash and others vs. State of U.P. and another (2002) 10 SCC 728 the apex Court has held that the seniority shall be counted from the date of initial appointment. The observations are quoted below:

"According to the writ petitioners they were appointed on temporary basis against substantive vacancies in accordance with the Rules prevalent at the time of their respective appointments. They had the requisite qualifications and their appointments were made after selection by DSC, after sanction granted by the governor and with the approval of PSC. They claim to have at least continued to serve in such substantive vacancies after consultation with PSC and had been granted leave benefits, promotions increments and other service benefits of regular service. They therefore, claim seniority from the date of their initial appointment on the principle laid down in Mathur case. According to the petitioners PSC select lists prepared in 1972 and 1977-78-79 are not available with the respondent states as they

have been admittedly destroyed or misplaced and they 1996 seniority list was purportedly based on them. It is stated that the State Government has not issued any letters of regular appointment to any selectee till today. It is contended that the selectee who had not been temporarily appointed elarlier were given temporary appointments after their recommendations by PSC in 1972 or 1977-78-79. Many of them joined services on the basis of these orders of temporary appointment much later. Now on the basis of the decision in Tandon case the were claiming seniority from the date of their selections whether in 1972 or 1977-78-79 even though they had not joined services at all then. It is submitted that the selectees could not claim seniority on the basis or P.SC recommendation which apart from any other consideration, could not be kept alive for such a long period."

Petitioners have submitted that since the petitioners are L.T. grade teachers and lecturers, they are entitled for their seniority from the date of their initial appointments. They have further submitted that the seniority of all the C.T. grade teachers who were on adhoc basis have been taken into consideration from the date of their initial appointments.

The petitioners therefore, have stated that they are entitled to their seniority from their initial date of appointments. Petitioners have also filed supplementary affidavit wherein paragraph 4 it has been

stated that teachers who were appointed on temporary/ ad hoc basis and were teaching regularly till 13.6.1980, their services have been regularised in compliance of the Radiogram dated 19.6.1980.

Sri B.D. Kandpal, Standing Counsel for the State of Uttaranchal has stated that no decision has yet been taken on the representations made by the petitioners regarding their seniority. He has also stated that seniority will be determined in accordance with seniority rules.

The petitioners have already made their representations, which shall be decided in accordance with law and in the light of observations made above within one month after receipt of certified copy of this judgment.

The petitioners apprehend that promotions are going to be made, suffice it it observe that the respondents shall fix the seniority by disposing of the representations of the petitioners in accordance with law.

A writ of mandamus is issued directing the respondents to consider the seniority of the petitioners in accordance with the rules applicable to them.

With the aforesaid observations the writ petition is disposed of. No order as to costs.

(Rajesh Tandon, J.)

23.10.2003
Dhyani